90-894

No. _____

FILED

DEC 5 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

REYNOLD LEONE, As Administrator of the Estate of ANDREA LEONE, Also Known as ANDREA HELD, Deceased, FRANCES S. COSTIGAN (now known as COSTIGAN-LEEDS), as Executrix of the Estate of GEORGE B. COSTIGAN, JR., Deceased,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Milton G. Sincoff
(Counsel of Record)
Daniel M. Kolko
Kreindler & Kreindler
100 Park Avenue
New York, New York 10017-5590
(212) 687-8181

Attorneys for Petitioners

December 5, 1990

QUESTION PRESENTED

The Federal Aviation Act requires the government's Federal Aviation Administration to determine the medical fitness of pilots. The statute authorizes the FAA to delegate those powers and duties to private persons. Several thousand private doctors are currently designated as Aviation Medical Examiners ("AMEs") by and act as official representatives of the FAA when examining pilots. Those AMEs are controlled in detail by the government in using its procedures to determine the medical fitness of approximately 575,000 pilots a year.

Under the Federal Tort Claims Act ("FTCA"), the federal government is liable for the negligence of its employees. They are statutorily defined to include "persons acting on behalf of a federal agency in an official capacity, temporarily . . . in the service of the United States . . . without compensation."

The question thus presented is whether the government or an AME personally is liable for damages caused by the negligent finding of a pilot as medically fit to fly.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Regulations:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-_____

REYNOLD LEONE, As Administrator of the Estate of ANDREA LEONE, Also Known as ANDREA HELD, Deceased, FRANCES S. COSTIGAN (now known as COSTIGAN-LEEDS), as Executrix of the Estate of GEORGE B. COSTIGAN, JR., Deceased,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 910 F.2d 46, and is reprinted as Appendix A. The Memorandum and Order of the United States District Court for the Eastern District of New York is reported at 715 F. Supp. 1182, and is reprinted as Appendix B.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit which reversed the district court and remanded with instructions to grant respondent's motion for summary judgment dismissing the complaints was entered on July 30, 1990. Petitioners then filed a timely petition for rehearing and suggestion for rehearing in banc. On September 6, 1990, the Court of Appeals issued and entered an Order denying the petition. A copy of the Order denying the petition for rehearing and suggestion for rehearing in banc is reprinted as Appendix C. This petition for certiorari was filed within 90 days of the date of the Order denying the petition for rehearing.

This Court has jurisdiction to review the Judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The government is subject to suit under the FTCA for damages caused by the negligence of "any employee of the Government" (28 U.S.C. § 1346(b)). "Employee of the government" is statutorily defined in 28 U.S.C. § 2671:

> "Employee of the government" includes officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

Section 2671 further provides that the term "Federal agency"

> includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

Title 49, United States Code, § 1422(a)(1) reads in part:

> (1) Any person may file with the Secretary of Transportation an application for an airman certificate. If the Secretary of Transportation finds, after investigation, that such person . . . is physically able to perform the duties . . . he shall issue such certificate, containing such terms, conditions, and limitations as to . . . tests of physical fitness, and other matters as the Secretary of Transportation may determine to be necessary to assure safety in air commerce.

Title 49, United States Code, § 1355(a) reads in part:

> (a) In exercising the powers and duties vested in him by this chapter, the Secretary of Transportation may . . . delegate to any properly qualified private person . . . any work, business, or function respecting (1) the examination, inspection, and testing necessary to the issuance of certificates under subchapter VI of this chapter, and (2) the issuance of such certificates in accordance with standards established by him. The Secretary of Transportation may establish the maximum fees which such private persons may charge for their services and may rescind any delegation made by him pursuant to this subsection at any time and for any reason which he deems appropriate.

STATEMENT OF THE CASE

Statement of Facts

Petitioners' decedents were killed in November 1984 when the private aircraft in which they were passengers crashed into the Atlantic Ocean as a result of the pilot having a heart attack.

The pilot, Irwin Small, had been examined and certified as medically fit to be a pilot by the FAA's AME Dr. Sabatine in September 1982. Sabatine had been annually appointed by

the FAA for many years. Pilot Small was subsequently examined and certified as medically fit to be a pilot by the FAA's AME Dr. Conlon in August 1984, three months before the fatal crash. Dr. Conlon had also been appointed as an AME numerous times by the FAA.

When he was certified as medically fit by those two AMEs, the pilot suffered from serious coronary heart disease manifested by a patently observable surgical scar from a cardiac catheterization (A 165-166, 168-169, 181-183, 185-187, 201-203, 216-228).[1] The AMEs performed careless examinations of the pilot by failing to see the surgical scar and discover his serious heart condition.

No person can become a pilot unless the government first determines that he is physically fit (49 U.S.C. § 1422(b)(1); 14 C.F.R. § 61.3(c); *see* 49 U.S.C. § 106(g)(1); 14 C.F.R. § 67.25(a)). Congress has also determined that the government's "powers and duties" to determine and certify fitness of pilots can be "delegated" to private persons (49 U.S.C. § 1355(a)). The "delegation" can be rescinded at any time and for any reason (*ibid.*).

The government has delegated these "powers and duties" to AMEs. AMEs are "selected" and "designated" by the Federal Air Surgeon to act as "representatives" of the FAA (14 C.F.R. §§ 183.1, 183.11(a)). The FAA appoints AMEs for one year, subject to annual extensions of one year for "satisfactory performance" (A 115, 120, 142; 14 C.F.R. § 183.15(a)). The Federal Aviation Regulations specify the "privileges" of designation, including conducting physical examinations of pilot-applicants "[u]nder the general supervision of the Federal Air Surgeon . . . ." 14 C.F.R. § 183.21(b). The AME designation may be terminated at any time for performance reasons or any reason the FAA considers appropriate (14 C.F.R. § 183.15(a), (d)(4-6)).

---

1 Citations in the form "A ____" are to the Joint Appendix filed in the Court of Appeals.

The FAA has expressly delegated to AMEs the authority to

> (1) *Examine* applicants for and holders of medical certificates *for compliance with applicable medical standards*; and
>
> (2) *Issue, renew, or deny medical certificates* to applicants and holders *based upon* compliance or noncompliance with *applicable medical standards.*

14 C.F.R. § 67.25(a)(1), (2) (emphasis added).

This same authority delegated to AMEs has also been delegated to "authorized representatives of the Federal Air Surgeon within the FAA". 14 C.F.R. § 67.25(a).

There are approximately 7,000 AMEs. They process nearly 575,000 applications for airman medical certification annually (A 76).

An FAA Order characterized the AMEs as "representatives" of the FAA who assumed "responsibilities *directly* related to the agency's safety program" (A 109, emphasis added).

The FAA issued each AME *75 pages of detailed instructions* as to technique of examination and proper medical assessment and certification procedure (A 73, 75, 110, 123). These instructions were contained in the *Guide for Aviation Medical Examiners* ("Guide") (A 74-107). It specified the areas of the body to be examined, the examination techniques and procedures to be followed, the medical standards to be applied, and the resulting disposition. AMEs were also instructed by the guide to observe and report "signs of surgery" (A 91). An FAA Order, also issued to each AME, *required* an AME to agree to abide by FAA rules, regulations, policies and procedures (A 110). The FAA Order "required" AMEs "to agree to comply with" and "be thoroughly familiar with *instructions* as to technique of examination" (A 110) (emphasis added).

Dr. Douglas Busby, a former Deputy Federal Air Surgeon, Dr. Menard Gertler, an AME for over 25 years, and AME

Conlon all affirmed under oath that the Guide and the detailed examination techniques and procedures set forth in the Guide were binding on the AME (A 159, 188-189, 248-249, 258).

"[T]he FAA Order requires the AMEs to comply with the *Guide*, to attend training seminars, to obtain and use particular equipment, and to perform personally each pilot examination" (Opinion by Dearie, D.J., Appendix B, p. B-4).

The FAA Order stated that "[i]t is the policy of the [FAA] to continuously evaluate the performance of each AME" (A 115). AMEs were continuously evaluated based on the number and accuracy of examinations performed and their "error rate" in certification (A 115-116). AMEs not performing a "significant number" of AME examinations in any 12-month period were subject to non-redesignation (FAA Order, A 116).

The FAA Order further provided that an AME may be terminated or not redesignated for substandard professional performance or failure to follow "FAA rules, regulations, policies or procedures" (A 117). Termination could occur for any other reason deemed appropriate (14 C.F.R. § 183.15(d)(6)).

In a section entitled "Agreements" the FAA Order confirmed the provisions in the AME Application that AMEs "shall be required to agree to comply . . . and be thoroughly familiar with instructions as to technique of examination, medical assessment, and certification of examinees" and to "abide by the policies, rules and regulations of the FAA" (A 110).

When an AME had a question or needed assistance, the Guide stated the Regional Flight Surgeon "should be contacted" and "[t]elephone interpretation of medical standards or policies involving an individual airman whom the [AME] is examining" can be obtained (A 80). Indeed, both AMEs Sabatine and Conlon called the Regional Flight Surgeon at JFK (A 255-257, 283).

According to former Deputy Federal Air Surgeon Douglas Busby, until June 1987 (one month after commencement of the instant FTCA actions), the FAA informed AMEs that the government would defend AMEs and pay any judgments for negligent certification (A 153-154). AME Sabatine testified that this was his understanding (A 274-277). The FAA's current Deputy Federal Air Surgeon Jon Jordan responded that FAA policy was that there was "no guarantee" that AMEs would receive legal representation and the FAA considered each case on an individual basis (A 69-70).

Dr. Busby also stated that doctors on the FAA's full-time payroll performed pilot medical examinations and issued or denied medical certificates in the same way as private AMEs and "without the physical presence of any other FAA doctor, employee or supervisor" (A 161). This was not denied by the FAA's Dr. Jordan (A 70-71).

The FAA promulgated detailed medical standards which pilot-applicants seeking certification must meet. 14 C.F.R. §§ 67.13, 67.15, 67.17. The medical standards applicable to third class certificates, pilot Small's category, were set forth in § 67.17. AMEs must adhere to and apply those medical standards. 49 U.S.C. § 1355(a); 14 C.F.R. § 183.21(c). In this case, Small's disqualification for his serious heart disease was compelled by these medical standards. 49 U.S.C. § 1355(a); 14 C.F.R. § 67.17(e).

AMEs received no remuneration from the FAA, but instead were paid a fee by each pilot-applicant. By statute, however, the FAA Administrator had the authority to set the maximum fee an AME may charge. 49 U.S.C. § 1355(a). As a matter of policy, the FAA informed AMEs that their fee should be governed by the prevailing rate for similar services in the locality (A 79; A 123).

AMEs could be promoted by the FAA to Senior AME status and thus perform medical examinations for first-class certificates (A 109). AME Sabatine had been promoted (A 270).

The Decisions Below

The United States District Court for the Eastern District of New York had denied the government's motion for summary judgment dismissing the complaints and had granted petitioners' cross motion for partial summary judgment striking that part of the respondent's affirmative defense asserting that the government was not liable for the AMEs' negligence, stating "[t]hrough its demanding and detailed regulations, the FAA dictates virtually every action the AME should undertake" in examining and certifying pilots (Appendix B, p. B-9).

The Court of Appeals held, as a matter of law, that the Federal Aviation Administration's Aviation Medical Examiners ("AMEs") were independent contractors, and not "employees of the government" whose negligent acts render the government liable under the Federal Tort Claims Act.[2] The Court of Appeals held that "while the FAA acts generally as an overseer it does not manage the details of an AME's work or supervise him in his daily duties." (Appendix A, p. A-10). The Court of Appeals held that AMEs were neither "employees" of the FAA nor persons "acting on behalf" of the FAA, in an official capacity in the service of the United States. The Circuit Court reversed District Judge Dearie of the Eastern District of New York and remanded with instructions to grant the respondent's motion for summary judgment dismissing the complaints.

---

2 The appeal was before the Second Circuit on certification pursuant to 28 U.S.C. § 1292(b).

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUIT COURT DECISION THREATENS THE COLLAPSE OF THE AME SYSTEM AND PUBLIC SAFETY

The government has conceded the profound significance of the issue presented:

> [T]he importance of this controlling question can be seen by the effect on the FAA, although the effects of this issue are applicable to other agencies as well. The Federal Aviation Administration has over 12,000 designees, approximately *7,000 of whom are AMEs.* The operational impact of [the lower court's decision] *materially affects the nationwide operation of the FAA* . . . . (Government's Memorandum dated December 20, 1989 in Support of Motion to Second Circuit to Certify Lower Court Determination for Interlocutory Appeal, p. 7) (Emphasis added).

By holding that AMEs are independent contractors and not "employees of the government", the Court of Appeals has subjected approximately 7,000 AMEs, physicians in private practice located throughout the country, who perform a public service for the FAA,[3] to personal liability for their performance of official FAA duties.

That consequence harshly destroys the justified expectations heretofore held by AMEs that they would be protected by the government from defending such suits and personal liability. Before this suit, the government expressly promised such protection by declaring that the government would defend and indemnify AMEs (A 153-154, 274-277).

The personal exposure of AMEs to defending lawsuits and paying judgments will cause the collapse of the present AME

---

3 Some AMEs, like AME Sabatine, perform one AME examination a month (A 270).

system. Private physicians will now refuse to apply for or accept annual re-appointment as an AME in order to avoid suits and liability. AMEs annually process 575,000 applications for airman medical certification. The federal government has few payroll physicians and cannot fill the resulting void. By federal law, airline pilots must be examined and certified annually. Private pilots are examined-certified bi-annually.

Suits alleging negligent medical certification of pilots arising from an aviation disaster will expose AMEs to claims not covered by their private malpractice insurance or beyond policy limits. For AMEs to obtain liability insurance covering their personal exposure would impose cost-prohibitive additional premiums.

The Court of Appeals' decision allows the government to escape liability for the AME system that it created and strictly controls, and for whose benefit and on whose behalf it was established.

The Second Circuit decision removes any incentive for the FAA to properly police, discipline and be held accountable for its own designated representatives performing core government functions. Making the AME personally liable will not alleviate slipshod examinations. It will either lead to AME resignations or an increase in malpractice insurance and premiums.

A recent article in *The Wall Street Journal*[4] discussed the problem of FAA designated flight examiners who failed to weed out incompetent pilots, with tragic consequences. According to the article, the General Accounting Office reported last year that "unacceptable practices . . . such as improper flight testing, seriously impair FAA's ability to ensure that only safe and competent pilots receive pilot certificates." The article concluded by quoting an FAA inspector—"the only victim is the general public."

---

4 October 23, 1990, p. 1. The title is "Some FAA Examiners Give Slipshod Tests to Student Pilots".

II.

THE CIRCUIT COURT DECISION HAS ABROGATED THE STATUTE BY JUDICIALLY CREATING AN EXEMPTION

The FTCA "waives the Government's immunity from suit in sweeping language". *United States v. Yellow Cab Co.*, 340 U.S. 543, 547, 554 (1951). The FTCA provision "employee of the government" was "drafted to have an expansive reach". *Witt v. United States*, 462 F.2d 1261, 1263 (2d Cir. 1972). This Court in *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949), rejected the government's suggestion that the FTCA be strictly construed.

In light of these holdings, and given the clear statutory language, only Congress, not a Court, is empowered to immunize the government under the circumstances presented. This Court in *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957), cautioned:

> There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.

The FAA statute delegating to private persons the government's powers and duties of determining the medical fitness of pilots was enacted well after passage of the FTCA which imposed liability on the government for the negligence of those acting on its behalf. The FTCA's terms literally apply to AMEs. No legislative history suggests an exemption of the government.

In post-FTCA statutory enactments, Congress specifically excluded certain groups as government employees or agents. For examples, 50 U.S.C. § 2253(c) (civil defense volunteers); 15 U.S.C. § 1275(5) (members of the Toxicological Advisory Board); 21 U.S.C. § 114h(c) (agricultural advisory committee members hired by Secretary of Agriculture); 42 U.S.C. § 8104(e) (officers and employees of Neighborhood Reinvest-

ment Corporation). No such exemption for AMEs was ever enacted.

Had the Executive, Department of Transportation or the FAA truly deemed it necessary or intended to exclude AMEs as government employees or agents for FTCA purposes, a simple statutory amendment would have sufficed. At the very least, some expression of legislative intent would have been a reasonable expectation. The Court of Appeals usurped Congress' powers and judicially legislated an exemption from FTCA liability. Indeed, that Court said "[W]e do not believe that such an extension of the FTCA's waiver of sovereign immunity is appropriate." Appendix A, p. A-12. The Court below rendered a policy judgment that AMEs, not the government, will be liable. Only Congress is empowered to make that policy.

The Court of Appeals' failure to apply the clear and literal "acting on behalf of" language of the statute was error for clear statutory language can only be overridden by "extraordinarily clear evidence of a contrary legistative intent." *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988); *Garcia v. United States*, 469 U.S. 70, 75 (1984). Such evidence is nonexistent (*see Logue v. United States*, *infra*, 412 U.S. 521, 530 (1973)).

III.

THE CIRCUIT COURT DECISION DEVIATED FROM THIS COURT'S DECISIONS

This Court has held that the critical factor distinguishing a federal government servant/agent from an independent contractor "is the authority of the principal to control the detailed physical performance of the contractor." *Logue v. United States*, 412 U.S. 521, 527-528 (1973); *United States v. Orleans*, 425 U.S. 807, 814 (1976).

In *Logue*, a federal agency contracted with a county for it to jail federal prisoners. While the federal-county contract

obligated the *county* to comply with federal prison regulations, it gave the government "no authority to physically supervise the conduct of the jail's employees". 412 U.S. at 530. *Logue* held the government was not liable for the negligence of the County Jail employees because they were neither servants nor agents of the federal government, but rather they were employees of the independent contractor-county.

The Court cited with approval the Restatement (Second) of Agency § 2 (1958):

> (1) *A master is a principal* who employs an agent to perform services in his affairs and *who controls or has the right to control the physical conduct* of the other *in the performance of the service.*
>
> • • •
>
> (3) *An independent contractor* is a person who contracts with another to do something for him but who *is not controlled by the other nor subject to the other's right to control* with respect to his *physical conduct in the performance* of the undertaking. *Id.* at 527, note 5. (Emphasis added).

As to the separate contention that the county jail employees were agents "acting on behalf of a federal agency", *Logue* held that "we are not persuaded that employees of a contractor with the Government, whose physical performance is not subject to governmental supervision, are to be treated as 'acting on behalf of' a federal agency". *Id.* at 531.[5]

Logue was reinforced by *United States v. Orleans*, 425 U.S. 807 (1976). In *Orleans*, a local community action agency was funded under the Economic Opportunity Act of 1964. It had to comply with federal regulations "aimed at assuring compliance with [federal] goals" (*Id.* at 816). The action agency was locally controlled and the regulations did not

---

5 Clearly AMEs are "subject to governmental supervision" (*Logue*, 412 U.S. at 531) and are thus "acting on behalf" of the FAA.

alter that fact. The local persons were not hired, fired, trained and supervised by any federal agency. *Orleans* held that the local entity was not a federal agency under the FTCA. *Orleans* did not involve the "acting on behalf of" provision.

Orleans stated the issue as whether the contractor's "day-to-day operations are supervised by the Federal Government." *Id.* at 815.

Then the rationale was articulated:

> [Federal] regulations and guidelines attempt to assure that the federal money is spent for the benefit of the poor. *The regulations do not give the [federal agency] power to supervise the daily operation of a community action agency or a neighborhood program.*
>
> Nothing could be plainer than the congressional intent that *the local entities here in question have complete control over operations* of their own programs . . *Id.* at 818. (Emphasis added).

Orleans also reasoned:

> Although [federal] regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs—or of state governmental bodies-into federal governmental acts. *Id.* at 816.

The District Court below held:

> The Court wonders what greater degree of control could be exercised over AMEs, unless an FAA official literally sat in the examination rooms, either prompting the AME to ask a question he or she might forget to ask, or holding the stethoscope as the AME listened to an applicant's heartbeat. It is noteworthy that at oral argument the Court asked the government on what set of facts it would deem the "strict control" test met in this case; the government was unable to provide a definitive or even helpful answer, suggesting merely that the test

> might be met if a badge-wearing FAA official read the applicable medical standards to each AME in person before each examination.
>
> In this Court's view the "strict control" test should be applied not with the absurd literalness suggested by the government, but sensibly, with due regard for the totality of the circumstances, including the nature of the services performed and the configuration of the parties' relationship. (Appendix B, pp. B-9-10).

The Second Circuit held that "the FAA does not maintain the type of control over the AMEs that is required by *Logue* and *Orleans*" (Appendix A, p. A-10).

The record, however, established pervasive, constant and "daily" control exercised by the FAA over the physical performance of AMEs through the Federal Aviation Regulations, FAA Guide and Order. The FAA *required* AMEs to use specified and detailed medical examination and assessment techniques and procedures (in the circuit court's words—"step-by-step instructions") and *required* AMEs to apply prescribed medical standards. Failure to comply could result in the AME's termination. The AMEs were instructed by the FAA as to what to do, how to do it and when and under what medical circumstances they could issue or deny certification. The FAA controls the result to be accomplished as well as the manner and means by which the result is to be accomplished. Also not mentioned in the Circuit Court's decision is the significant fact that FAA full-time employees who perform as AMEs function in the same way as private AMEs—according to the FAA Regulations, Guide and Order and without the physical presence of any other person (A 161). The FAA exercises the same control over both! It is hard to envision greater control.[6]

---

6 There is no dispute that the AMEs were not paid by the United States and were paid by pilot Small. But section 2671 declares the pres-

The jail employees in *Logue* were "hired, fired, trained, disciplined, and supervised exclusively by state officials, and they are not required to follow the orders of any federal officer" (Brief for the United States in *Logue*, p. 34). The individuals in *Orleans* were likewise controlled by local-not federal-officials. By contrast, AMEs are hired, fired, trained, evaluated and directed in their work in detail by the FAA, and are obligated to abide by FAA rules, regulations, policies and procedures.

In *Logue* and *Orleans* the pertinent regulations did not impact the individual actors' duties. At bar, the FAA Regulations, Order and Guide dominate every aspect of the AMEs' functions and duties as an AME. AMEs perform core government functions for, on behalf of and at the behest of the FAA. The rationale of *Logue* and *Orleans* compels reversal of the Court of Appeals.

The Circuit Court did not mention the FAA's absolute right to fire an AME for any reason. That factor further establishes control and is contrary to an independent contractor relationship. *See E.F. Williams Co. v. United States*, 139 F. Supp. 875, 878 (N.D.N.Y. 1956) ("The broad right to discharge asserted here by the [employer] . . . is indicative of a right of control of both the details and time of performance"); 2A C.J.S. *Agency* § 6, p. 561 (generally, the power of principal to terminate services of agent shows control).

Relying on *Orleans*, the Court of Appeals placed significance in the fact that the FAA performs no on-site review over AMEs. But the FAA has no on-site review of its own full-time payroll doctors when they perform as AMEs

---

ence or absence of compensation to be irrelevant. *See Martarano v. United States*, 231 F. Supp. 805, 808 (D. Nev. 1964) (fact that individual was paid by the state does not disqualify him as an employee of the federal government for FTCA purposes). Further, the FAA Administrator had the authority to set the maximum fee an AME may charge. 49 U.S.C. § 1355(a). As a matter of policy, the FAA informed AMEs that their fee should be governed by the prevailing rate for similar services in the locality (A 79; A 123).

(A 161). Neither *Logue* nor *Orleans* was meant to impose a requirement of on-site supervision. This unrealistic requirement would negate most employment or agency relationships. The "right to control" contemplated by the employer-employee relationship "requires only such supervision as the nature of the work requires." *McGuire v. United States*, 349 F.2d 644, 646 (9th Cir. 1965). The court in *Flemming v. Huycke*, 284 F.2d 546, 550 (9th Cir. 1960), held:

> The methods by which physicians work are directed by the standards of their profession and are peculiarly unsuited to direction and close control by an employer.

IV.

THE CIRCUIT COURT DECISION CONFLICTS WITH PRIOR CIRCUIT AND DISTRICT COURT DECISIONS

In *Witt v. United States*, 462 F.2d 1261 (2d Cir. 1972), the plaintiff was a military prisoner who "volunteered" for a prison work detail cleaning stables at the Fort Leavenworth Hunt Club, a private association of military personnel and their dependents located on the military reservation. The Hunt Club contracted with a civilian named Harrison to manage the stables and he in turn hired McQuirk, another civilian, to assist. McQuirk was paid by Harrison. McQuirk picked up Witt in a tractor and took him to the Hunt Club. On the return trip, Witt was injured.

As a matter of law, the Second Circuit held that "McQuirk was 'acting on behalf of a federal agency [the United States Disciplinary Barracks] in an official capacity' ":

> [A]lthough no written agreement existed, McQuirk was impliedly authorized by the Commandant of the Disciplinary Barracks to transport prisoners in his custody to a work detail . . . to supervise or help supervise that detail and to return the prisoners. *Moreover*, McQuirk

> was certainly amenable to *some degree of control* by the Disciplinary Barracks. *Id.* at 1264. (Emphasis added).

Witt was discussed with approval by this Court in *Logue, supra*, 412 U.S. at 532, n. 8. It was not discussed below.

In addition to *Witt v. United States, supra*, (civilian driver of federal prisoners to clean stables), the "acting on behalf of" clause has been relied on by courts to subject the government to liability for the torts of a private contractor managing government owned property on a not-for-profit basis for the benefit of the United States (*Ferguson v. United States*, 712 F.Supp. 775, 781-82 (N.D. Cal. 1989)); FBI informers (*Socialist Workers Party v. Attorney General*, 642 F. Supp. 1357, 1423 (S.D.N.Y. 1986)); and of managing agents who operate public housing projects, even though the agents are corporate entities (*State of Maryland v. Manor Real Estate & Trust Co.*, 176 F.2d 414, 419 (4th Cir. 1949). The holding below squarely conflicts with these authorities.

Missing from the brief portion of the Circuit Court decision discussing the "acting on behalf of" clause is the detailed factual record set forth in petitioners' brief establishing the FAA's detailed control over AMEs and that AMEs act on behalf of the FAA in an official capacity, temporarily in the service of the United States and without compensation.

The Second Circuit's holding is in direct conflict with *Berman v. United States*, 572 F. Supp. 1486, 1494 (N.D. Ga. 1983) (AMEs carry out a "direct function of government"; government's motion for summary judgment on the ground it is not liable for an AME's negligence denied); and *In re Air Crash Disaster near Silver Plume, Colorado*, 445 F. Supp. 384, 396, 400, 405-406 (D. Kansas 1977) (holding an FAA designated authorized inspector was an FAA employee under the FTCA since his work was required to be carried out according to specific FAA standards, brochures, guidelines and airworthiness directives).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that their petition for writ of certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

/s/ MILTON G. SINCOFF
Milton G. Sincoff
(Counsel of Record)
Daniel M. Kolko
Kreindler & Kreindler
100 Park Avenue
New York, New York 10017
(212) 687-8181

Attorneys for Petitioners

December 5, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1297—August Term, 1989

(Argued: May 11, 1990 Decided: July 30, 1990)

Docket No. 90-6017

REYNOLD LEONE, As Administrator of the Estate of ANDREA LEONE, Also known as ANDREA HELD, Deceased, FRANCES S. COSTIGAN (now known as COSTIGAN-LEEDS), as Executrix of the Estate of GEORGE B. COSTIGAN, JR., Deceased,

Plaintiffs-Appellees,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellant.

Before:

ALTIMARI and MAHONEY, *Circuit Judges*, and POLLACK, *District Judge*.*

* The Honorable Milton Pollack, United States District Court for the Southern District of New York, sitting by designation.

Appeal from an interlocutory order, entered in the United States District Court for the Eastern District of New York (Dearie, *Judge*), denying defendant-appellant's motion for summary judgment and granting plaintiffs-appellees' cross motion for partial summary judgment, holding that private physicians designated by the Federal Aviation Administration as Aviation Medical Examiners are employees of the government for purposes of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1988).

REVERSED AND REMANDED.

THOMAS B. ALMY, Senior Aviation Counsel, U.S. Department of Justice, Washington, D.C. (Stuart M. Gerson, Assistant Attorney General, Washington, D.C., Andrew J. Maloney, United States Attorney for the Eastern District of New York, Brooklyn, N.Y., of counsel), *for Defendant-Appellant.*

DANIEL M. KOLKO, New York, N.Y. (Milton G. Sincoff, Kreindler & Kreindler, New York, N.Y., of counsel), *for Plaintiffs-Appellees.*

ALTIMARI, *Circuit Judge*:

In this case, we consider whether private physicians, who are designated by the Federal Aviation Administra-

tion ("FAA") as Aviation Medical Examiners ("AMEs"), are "employees of the government" for purposes of the Federal Tort Claims Act ("FTCA" or "Act"), 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1988). Defendant-appellant United States appeals from an interlocutory order, entered in the United States District Court for the Eastern District of New York (Dearie, *Judge*), denying its motion for summary judgment and granting plaintiffs-appellees' motion for partial summary judgment. *See Leone v. United States*, 715 F. Supp. 1182 (E.D.N.Y. 1982).

Plaintiffs-appellees' decedents were passengers on a private airplane piloted by Irwin Small. En route, Small suffered a heart attack which resulted in the crash of the airplane and the death of all aboard. At the time of the accident, pilot Small held a current airman medical certificate which had been issued by FAA-designated AMEs. Plaintiffs-appellees commenced the underlying consolidated FTCA wrongful death actions against the United States complaining that the AMEs who examined Small and issued his airman medical certificate were negligent in failing to discover Small's true physical condition. The United States filed a motion for summary judgment, arguing that the AMEs, who were physicians engaged in the private practice of medicine, were not government employees, as defined by 28 U.S.C. § 2671, and, therefore, that the United States is not amenable to suit under the FTCA, *id.* § 1346(b). Plaintiffs-appellees filed a cross motion for partial summary judgment, seeking to strike the government's affirmative defense that the AMEs were not employees of the government. The district court denied the United States' motion and granted plaintiffs-appellees' cross motion, holding that the AMEs were "employees of the government" and

were "acting on behalf of the government" for FTCA purposes. *Leone*, 715 F.Supp. at 1190.

The district court certified the issue for interlocutory appeal, and this Court granted the United States' petition for review pursuant to 28 U.S.C. § 1292(b) (1988). For the reasons discussed below, we reverse the judgment of the district court and remand with instructions to grant the defendant-appellant's motion for summary judgment.

BACKGROUND

Pursuant to its statutory mandate to "insure the safety of aircraft," 49 U.S.C. App. § 1348(a) (1982), the FAA requires that no person act as a pilot of an aircraft unless in possession of, among other credentials, a current airman medical certificate. 14 C.F.R. §§ 61.3(c), 67.11 (1990); *see* 49 U.S.C. App. 1422(b)(1) (1982). To obtain an airman medical certificate, an applicant must undergo a medical examination and an evaluation of his medical history by an AME, and satisfy Federal Aviation Regulation medical standards. 14 C.F.R. § 67.11, 67.13, 67.15, 67.17.

Although the Federal Air Surgeon and his authorized representatives are empowered to issue medical certificates, *id.* § 67.25(a), the certificates are predominately issued by private physicians who have been designated as AMEs, *id.* § 183.21 (1990); *see* 49 U.S.C. App. § 1355(a) (1982). The process of designating AMEs is administered by the Federal Air Surgeon or his authorized representative. 14 C.F.R. 183.11(a). The designation is effective for one year, is renewable for additional periods of one year, and may be terminated at the dis-

cretion of the FAA. *Id.* § 183.15(a) & (d). An AME applicant must be "a professionally qualified physician in good community standing, licensed to practice medicine in the state, foreign country, or area in which the designation is sought and must be engaged in full-time practice at a specified address." FAA Order 8520.2C, para. 9(a)(1) (1978) (revised 1981); *see also* 14 C.F.R. § 183.11. The vast majority of physicians designated as AMEs maintain private practices or are affiliated with hospitals.

AMEs are authorized to: (a) accept applications for physical examinations necessary for issuing an airman medical certificate; (b) conduct those physical examinations; and (c) issue, renew or deny airman medical certificates in accordance with Federal Aviation Regulations. *See* 14 C.F.R. § 183.21; *see also id.* § 67.25. Although the FAA maintains regional lists of AMEs, *see id.* § 67.23, an applicant for a medical certificate is responsible for contacting and scheduling an appointment with the AME of his choice. With limited exceptions, AMEs conduct examinations in their own offices and are required to have "adequate facilities for performing the required examinations and possess or agree to obtain" a variety of specialized medical equipment. FAA Order 8520.2C, para. 9(a)(3)(e). Each AME is responsible for setting an appropriate fee to be charged for the examination, and payment is made by the applicant directly to the AME. Further, the FAA provides no insurance and does not pay workers' compensation or social security taxes for the AMEs.

AMEs act "[u]nder the general supervision of the Federal Air Surgeon," 14 C.F.R. § 183.21(b), and are referred to in Federal Aviation Regulations as "repre-

sentatives of the [FAA]," *id.* § 183.1. It is the policy of the FAA to continually evaluate AMEs. The evaluation primarily consists of assessing: (1) the adequacy of information the AME provides on the medical examination forms; (2) the "error rate" in certification; (3) reports from the aviation community concerning the AMEs' professional performance and personal conduct; (4) attendance at seminars; (5) performance reports, including quarterly and annual performance summaries. FAA Order 8520.2C, para. 13(b).

To assist AMEs in the performance of their duties, the FAA provides each AME with the Guide for Aviation Medical Examiners ("the Guide"). The Guide is designed to provide all pertinent information and guidance needed to perform the duties and responsibilities delegated to each AME by the FAA. Included in the Guide are step-by-step instructions for reviewing medical certificate applications and conducting physical examinations of the applicants. The Guide also details the proper use of the FAA medical examination form.

In 1982 and again in 1984, three months before the ill-fated flight, pilot Small was examined and certified by AMEs as medically fit to be a pilot. The AMEs were both physicians engaged in the private practice of medicine and employed by medical centers. At the time of the examinations, Small suffered from heart disease as well as other medical ailments. In violation of explicit instructions, as well as federal law, 18 U.S.C. 1001 (1988), Small failed to disclose the existence of these medical conditions on his certification application or in his discussions with the AMEs. The discovery of Small's maladies would have required the denial of his airman medical certificate. *See* 14 C.F.R. § 67.17(e). On this

appeal, as in district court, the plaintiffs-appellees contend that under the FTCA the AMEs are government employees and the United States is therefore liable for their allegedly tortious conduct.

DISCUSSION

The FTCA is a limited waiver of sovereign immunity making the Federal Government liable to the same extent as a private person for certain torts of employees of the government acting within the scope of their employment. 28 U.S.C. §§ 1346(b), 2671. The Act defines "employee of the government" to include "officers or employees of any federal agency, members of the military or naval forces of the United States, . . . and persons acting on behalf of a federal agency in an official capacity. . . ." *Id.* § 2671. The FTCA waiver of sovereign immunity, however, does not extend to independent contractors. *Id.*; *see United States v. Orleans*, 425 U.S. 807, 814 (1976). Thus, the central question on this appeal is whether the AMEs are FAA employees or independent contractors.

Whether a person is a government employee or an independent contractor is a question of federal law. *Logue v. United States*, 412 U.S. 521, 528 (1973). The Court in *Logue* and *Orleans* addressed the distinction. Both cases concerned allegedly negligent employees of government contractors. *Logue* involved a county jail that had contracted with the federal government to hold federal prisoners in custody. *Orleans* concerned a community action agency which was organized for the sole purpose of undertaking federal programs, which was funded entirely by the federal government, and all of whose activities were in compliance with government

standards and regulations. At issue in both cases was whether the contractors were "federal agencies" or independent contractors. The FTCA's definition of "federal agencies" includes, *inter alia*, entities that are "acting as instrumentalities and agencies of the United States." 28 U.S.C. § 2671. The issue was critical because, in contrast to independent contractors, the FTCA's waiver of sovereign immunity extends to the negligent acts of employees of "federal agencies."

Applying principles of agency law, the Court in effect recognized that the term "federal agency" is synonymous with "servant or agent" of the government. *See Logue*, 412 U.S. at 527-28 (citing Restatement (Second) of Agency § 2 (1958)); *Orleans*, 425 U.S. at 814-15. The Court concluded that the contractors were not servants because the government lacked the authority "to control the detailed physical performance of the contract." *Logue*, 412 U.S. at 527, 528; *see Orleans*, 425 U.S. at 814; *accord* Restatement (Second) of Agency § 2. Therefore, the federal government was held not to be liable for the conduct of the contractors' employees.

As the district court noted, the relationship between the employees in *Logue* and *Orleans* and the AMEs in this case is not perfectly analogous. *Leone*, 715 F.Supp. at 1187-88. *Logue* and *Orleans* involved organizations, which the plaintiffs argued were federal agencies. The present case concerns individual AMEs, who the plaintiffs-appellees argue are employees of the government. Unlike the district court, however, we are unconvinced that this distinction alters the relevant analysis. Indeed, in contrast to *Logue* and *Orleans* which confronted terminology specific to the FTCA, *i.e.* "federal agency," we are presented with conventional agency

relationships, *i.e.* employee (or servant) versus independent contractor. *See generally* Restatement (Second) of Agency §§ 2, 220. Similarly, we find no support in either statute or precedent for plaintiffs-appellees' contention that the reasoning of *Logue* and *Orleans* is inapplicable to physicians and other professionals. Neither *Logue* and *Orleans* nor the legislative history of the FTCA supports drawing an arbitrary distinction between professionals and other contractees. *See Wood v. Standard Products Co.*, 671 F.2d 825, 831 (4th Cir. 1982); *cf. Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (applying principles of agency to determine whether an attorney was a public employee acting under color of state law). Accordingly, we believe that the strict control test, as well as principles of agency, govern this inquiry. *See Charlima, Inc. v. United States*, 873 F.2d 1078, 1080-81 (8th Cir. 1989); *Cavazos v. United States*, 776 F.2d 1263, 1264 (5th Cir. 1985); *Wood*, 671 F.2d at 829.

Confronting the strict control test, plaintiffs-appellees nonetheless argue that the AMEs are employees of the FAA. In particular, they emphasize that the FAA provides the AMEs with detailed guidelines for conducting medical exams and requires the use of specific equipment and examination techniques. The FAA regulations also set forth the medical standards the AMEs must apply in assessing each applicant for certification. Further, each AME acts under the Federal Air Surgeon's general supervision, *see* 14 C.F.R. § 183.21(b), and the FAA continuously evaluates the AMEs.

The plaintiffs-appellees, however, fail to appreciate that such detailed regulations and evaluations are an insufficient basis to satisfy the strict control test. *See Letnes v. United States*, 820 F.2d 1517, 1519 (9th Cir.

1987). The question is not whether a contractor must comply with federal regulations and apply federal standards, but whether its day-to-day operations are supervised by the Federal Government. *See Orleans*, 425 U.S. at 815; *see also Charlima*, 873 F.2d at 1081; *Brooks v. A.R. & S. Enterprises*, 622 F.2d 8, 11 (1st Cir. 1980). Thus, while the FAA acts generally as an overseer, it does not manage the details of an AME's work or supervise him in his daily duties. Indeed, neither the supervision provided by the Federal Air Surgeon nor the FAA procedures to evaluate the AMEs entail on-site review or day-to-day management. Accordingly, the FAA does not maintain the type of control over the AMEs that is required by *Logue* and *Orleans*.

A similar outcome follows when the AMEs' relationship to the FAA is analyzed in accordance with the Restatement (Second) of Agency. The Restatement, section 220(2), provides that in determining whether one acting for another is an employee or independent contractor, the following relevant factors are to be considered: the extent of control which, by agreement, the master may exercise over the details of the work; whether or not the one employed is engaged in a distinct occupation or business; the kind of occupation, with reference to whether the work is usually done under the direction of the employer or by a specialist without supervision; the skill required in the particular occupation; whether the employer or the workman supplies the instrumentalities, tools and the place of work; and the method of payment, whether by time or by the job. *See also* 1 L. Jayson, *Handling Federal Tort Claims* § 203.01, at 8-58 (1990).

The FAA, as discussed above, does not maintain control over the detailed physical performance of the AMEs. The individuals who serve as AMEs are professionally qualified physicians; most maintain their own private medical practices or are affiliated with hospitals. Each AME is free to examine as few or as many applicants as he desires. The AMEs obviously are specialists, who usually work without supervision. The performance of their duties clearly requires special skill and training. To that end, AMEs are responsible for being informed as to the progress of aviation medicine, Order 8520.2C, para. 9(a)(3)(a), and necessarily rely on their own professional judgment in making certification decisions. Each AME also must supply the instrumentalities, tools and the place of work. Additionally, each AME sets his own fee and is paid directly by the applicant. Also instructive is the fact that the FAA provides no insurance and does not pay workers' compensation or social security taxes for the AMEs. *See* 1 L. Jayson, *supra*, § 203.04, at 8-59. Viewed in toto, these factors demonstrate that AMEs are independent contractors and not employees of the government.

Finally, plaintiffs-appellees argue that AMEs should be considered employees of the government because they are acting on behalf of the FAA. Section 2671 of the FTCA states that "persons *acting on behalf of* a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation" are to be considered employees of the government. 28 U.S.C. § 2671 (emphasis added). Plaintiffs-appellees contend that because the AMEs are deemed "representatives of the [FAA]," 14 C.F.R. § 183.1, and are provided with an FAA identifi-

cation card, they are acting on behalf of the government. We disagree.

Authorities that have discussed this clause indicate that it is designed to cover special situations such as government officials who serve without pay, or an employee of one government agency who is loaned to and works under the direct supervision of another government agency. *Logue*, 412 U.S. at 531; *accord* 1 L. Jayson, *supra*, § 203.04, at 8-75. The fact that an independent contractor holds a government I.D. card or that a federal regulation refers to the contractor as a "representative" does not satisfy our understanding of the meaning of the "acting on behalf of" clause. Moreover, to hold that this clause provides for FTCA liability, when there is inadequate control or other indications of an employee relationship, would seriously undermine the FTCA's independent contractor exemption. *Cf. Logue*, 412 U.S. at 532. We do not believe that such an extension of the FTCA's waiver of sovereign immunity is appropriate.

CONCLUSION

Based on the foregoing, the order of the district court, denying the government's motion for summary judgment and granting plaintiffs-appellees' cross-motion for partial summary judgment, is reversed and the case is remanded with instructions to grant the defendant-appellant's motion for summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CV 87-1568

REYNOLD LEONE, as Administrator of the Estate of ANDREA LEONE, also known as ANDREA HELD, deceased,

Plaintiff,

—against—

UNITED STATES,

Defendant.

FRANCIS S. COSTIGAN (now known as COSTIGAN-LEEDS), as Executrix of the Estate of George B. Costigan, Jr., deceased,

Plaintiff,

—against—

UNITED STATES,

Defendant.

MEMORANDUM AND ORDER

Attorneys:

For Plaintiff:
Milton G. Sincoff, Daniel M. Kolko
Kreindler & Kreindler
100 Park Avenue
New York, NY 10017

Dated June 27, 1989

For Defendant:
Thomas B. Almy
Torts Branch, Civil Division
U.S. Dep't of Justice
Washington, D.C. 20591

DEARIE, *District Judge.*

This is a Federal Tort Claims Act ("FTCA") suit brought by the estates of two individuals killed when the pilot of an airplane in which they were passengers suffered a heart attack and the plane crashed. Plaintiffs claim that the physicians who performed medical examinations of the pilot as a step in the pilot's licensing by the Federal Aviation Administration ("FAA") were "employees of the government" who conducted the examinations negligently.

The government has moved for summary judgment dismissing the complaint on the grounds that for the purposes of the FTCA, the physicians are independent contractors for whose alleged negligence the United States is not liable.

Plaintiffs have cross-moved for partial summary judgment striking the part of the government's fifth affirmative defense which sets forth the theory advanced in the government's present motion.

For the reasons set forth below, the government's motion is denied and plaintiffs' cross-motion is granted.

FACTS[1]

In pursuit of its statutory mandate to promote aircraft safety, *see* 49 U.S.C. § 1348(a), the FAA requires that persons seeking to be licensed as pilots first obtain the appropriate medical certification. 14 C.F.R. § 61.3(c). The FAA has promulgated detailed medical standards which applicants seeking certification must meet. 14 C.F.R. §§ 67.13, 67.15,

1 The facts are set forth in greater detail in this Court's prior decision in this action, *Leone, et al. v. United States*, 690 F. Supp. 1182 (E.D.N.Y. 1988).

67.17 (hereinafter the "applicable medical standards"). The determination that an applicant has (or has not) met the FAA's medical requirements is based on an examination conducted solely for that purpose and an evaluation of the applicant's medical history and condition. *Id.* at § 67.11.

The FAA has delegated the task of medical examination and evaluation of pilot applicants to physicians designated as Aviation Medical Examiners ("AMEs"). Specifically, the FAA has delegated to AMEs (and to the Federal Air Surgeon) the authority

> to issue or deny medical certificates to the extent necessary to (1) examine applicants for and holders of medical certificates for compliance with applicable medical standards; and (2) issue, renew, or deny medical certificates to applicants and holders based upon compliance or non-compliance with applicable medical standards.

Id. at § 67.25.

The vast majority of persons designated as AMEs are physicians in private practice, on hospital staffs, or otherwise not "employed" by the FAA. A few of the physicians the FAA designates as AMEs, however, are persons already employed by the FAA.

In 1981, the FAA issued a revised *Guide for Aviation Medical Examiners* (the "*Guide*") "to assist" AMEs in the performance of their duties. The *Guide* informs AMEs that the applicable medical standards (14 C.F.R. Part 65) are "established by law" and therefore binding on AMEs. The revised *Guide* also states, on its first page, that "the [AME] is a designated *representative of* the FAA Administrator with important duties and responsibilities" (emphasis added).

In 1978 the FAA issued an order (the "FAA Order"), revised in 1981, which states, *inter alia*, that "[i]t is the policy of the [FAA] to continuously evaluate the performance of each AME." Order, section 13(b)(1). AME evaluations assess (i) the "adequacy of information" the AMEs provide on forms following examinations; (ii) the "error rate" in certification; (iii) "reports from the aviation community concerning the AMEs' professional performance and personal conduct as

it may reflect on the [FAA];" (iv) attendance at seminars; and (v) performance reports, including a quarterly and annual performance summary and a training summary. *Id.* In addition, the FAA Order requires the AMEs to comply with the *Guide*, to attend training seminars, to obtain and use particular equipment, and to perform personally each pilot examination.

The FAA regulations also provide that when conducting the examinations, AMEs act "[u]nder the *general supervision* of the Federal Air Surgeon or the appropriate senior regional flight surgeon." 14 C.F.R. § 183.21(b) (emphasis added).

In addition to the FAA regulations, FAA Order, and the 1981 *Guide*, the FAA describes the duties and functions of AMEs in yet another publication, FAA Form 8510-2, the Aviation Medical Examiner Designation Application (the "Application"). In the Application, the FAA states that it utilizes AMEs "to carry out responsibilities for enforcement of physical standards prescribed in the [FAA regulations]" and that "the AME acts *officially as a representative* of the FAA. . . ." (emphasis added) The Application requires AME applicants to agree, as conditions of acceptance, to become thoroughly familiar with the *Guide*, to abide by the regulations, and to attend FAA seminars on aviation medicine. Finally, the Application informs AME applicants that all designations are made for one year, and that renewal is contingent upon, *inter alia*, the "accuracy and number of examinations performed."

AMEs receive no remuneration from the FAA but instead are paid a fee by each pilot applicant. The FAA has the authority, however, to set the maximum fee an AME may charge.

DISCUSSION

A. *Relevant Provisions of the FTCA.*

The FTCA, 28 U.S.C. § 1346(b), authorizes suits against the United States for damages:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission *of any employee of the Government while acting within the scope of his office or employment*, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. (emphasis added).

As is well known, there exist several exceptions to the FTCA's broad waiver of the sovereign's immunity.[2] The present motions involve the so-called "independent contractor" exception to the FTCA, embodied in the legislative definitions. Section 2671 of Title 28, U.S.C. provides:

> "Employee of the government" includes officers or *employees of any federal agency*, . . . and *persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation* (emphasis added).

Section 2671 further provides that the term "federal agency"

> includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, *but does not include any contractor with the United States.*

Id. (emphasis added).

---

2 This Court has previously held that the FTCA's "discretionary function" exception does not apply to AMEs because they perform a "regulatory activity." *Leone, supra*, 690 F. Supp. at 1188.

As the foregoing indicates, there are two theories under which the AMEs could be deemed "employees of the government:" either because they are "employees of any federal agency" (in this case, the FAA), *or* because they are "persons acting on behalf of [the FAA] in an official capacity . . ."

B. *The Arguments of the Parties.*

The government calls for a strict application of the Supreme Court's so-called "strict control" test, as announced in *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976), arguing that the AMEs are independent contractors, and therefore not employees of the government, because the government does not exercise on-site, day-to-day supervision over them.

Plaintiffs, on the other hand, argue that the AMEs are employees of the government because they "act on behalf of" the FAA. The government essentially ignores this theory, lamely arguing that the "acting on behalf of" clause does not apply in this case. Plaintiffs also argue, however, that the AMEs are employees of the government under a sensible application of the *Logue* and *Orleans* rationale.

As the foregoing indicates, the parties are in disagreement as to which of the two theories of section 2671—the "acting on behalf of" clause, or the contractor exception as construed in *Logue* and *Orleans*—governs the analysis of this case. The Court does not view this case as one that could be resolved simply by deciding that only one of the two available theories governs because, as demonstrated below, (i) the case is not on all fours with *Logue* and *Orleans* and yet it is perhaps too easily decided by the rarely invoked "acting on behalf of" clause; (ii) the Court believes that a common rationale governs regardless of the particular statutory language invoked; and (iii), even if the theories were entirely separable, the Court need not decide which of the two theories governs because under either theory, the AMEs are unquestionably persons for whose negligence the United States may be found liable.

C. *The "Strict Control" Test of* Logue *and* Orleans.

1. *The Cases.*

Since both plaintiffs and the government argue under *Logue* and *Orleans*, it is necessary to establish exactly what these two cases hold.

In *Logue*, plaintiffs brought suit under the FTCA alleging that their son's suicide, which occurred while he was a federal prisoner housed in a county jail, was caused by the negligent failure of employees of the Nueces County (Texas) jail to maintain adequate surveillance. Section 4002 of Title 18, U.S.C., authorizes the Federal Bureau of Prisons to contract with state prisons for the housing of federal prisoners. The Supreme Court held, however, that the government was not subject to suit because the county jail's employees were not "employees of the government" within the meaning of section 2671.

The Court rejected first the argument that the county jail was a "federal agency or instrumentality" within the meaning of 2671, and that its employees, accordingly, were "employees of the government," since the statutory definition of federal agency expressly excludes "any contractor with the United States." *Id.* The Court concluded that the county jail was not a federal agency because it was an independent contractor. Specifically, the Court found that the "contractor with the United States" language "adopt[s] the traditional distinction between employees of the principal and employees of an independent contractor with the principal." 412 U.S. at 527. The Court then announced that "the critical factor in making this determination is the authority to control the *detailed physical performance* of the contractor." *Id.* at 527-528 (emphasis added).

The Court noted that although the county provides custody in accordance with the Bureau of Prisons' "rules and regulations governing the care and custody of persons committed," the contract between the Bureau and the county gave the government "no authority to *physically supervise* the conduct of the jail's employees." *Id.* at 529-530 (emphasis added). The Court further observed that Congress, when authorizing the

government to contract with local jails, "clearly contemplated that the *day-to-day operations* of the contractor's facilities were to be in the hands of the contractor . . ." *Id.* (emphasis added). Accordingly, the Court concluded that the county jail was not a "federal agency," and its employees, therefore, not "employees of the government" under section 2671.[3]

United States v. Orleans, *supra*, is largely a reiteration and application of the principles announced in *Logue*. As in *Logue*, the issue in *Orleans* was whether a particular entity—in that case, a community action agency serving the poor—was a federal agency or an independent contractor within the meaning of section 2671.

A review of the facts of *Orleans* reveals that the relationship between the allegedly negligent individuals and the government resembles the relationship between the jail employees and the government in *Logue*. Under the Economic Opportunity Act, 42 U.S.C. § 2781 *et seq.*, ("EOA") the federal government provides financial support for community action programs administered by state-designated community action agencies. The Warren-Trumbull Council ("WTC"), as such an agency, organized a neighborhood opportunity center which sponsored a recreational outing for a group of children. The WTC arranged the transportation for the outing.

Suit was brought under the FTCA on behalf of a child who was injured when the car transporting him home from the WTC outing was involved in a collision. As expressly stated by the Court, the *sole* issue in *Orleans* was "whether a community action agency funded under the [EOA] is a federal instrumentality or agency for purposes of [FTCA] liability." 425 U.S. at 809. The precise holding of *Orleans* decided that the WTC and the neighborhood opportunity center were not federal agencies or instrumentalities for FTCA purposes. Consequently, under a *Logue* analysis, *employees of* the WTC (who ran the neighborhood opportunity center's out-

---

3 The *Logue* Court also rejected plaintiffs' attempt to rely on the "acting on behalf of" clause. This portion of the *Logue* opinion is discussed *infra* at section D.

ing) were not "employees of the government" for whose negligence the United States would be liable. In its reasoning, the *Orleans* Court simply reiterated and applied the *Logue* strict control test, stating that the "critical element in distinguishing an agency from a contractor is the power of the Federal Government 'to control the detailed physical performance of the contractor.' " 425 U.S. at 814 (citing *Logue*).

2. *Application to the Instant Action.*

As became clear during oral argument, the government would have this Court attribute nearly talismanic weight to the words "day-to-day" and the notion of *on-premises* supervision as applied in the *Logue* and *Orleans* opinions. During argument, counsel for the plaintiffs contended that the FAA does all it practically can to control, monitor and supervise the AMEs' performance, thus satisfying the *Logue* and *Orleans* standard. Plaintiffs suggested specifically that the FAA's promulgation of excruciatingly detailed regulations mandating how AMEs are to conduct exams is sufficient to satisfy *Logue* which counsels "that the critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor." *Logue*, 412 U.S. at 527-28. Without identifying precisely what, the government insists that more is required. This Court disagrees.

Through its demanding and detailed regulations, the FAA dictates virtually every action the AME should undertake during the examination, specifies the particular information that should be elicited from the pilot applicants, and explicitly sets forth the medical standards the AME must apply in assessing the information and in deciding whether to issue or deny a certificate. The Court wonders what greater degree of control could be exercised over AMEs, unless an FAA official literally sat in the examination rooms, either prompting the AME to ask a question he or she might forget to ask, or holding the stethescope as the AME listened to an applicant's heartbeat. It is noteworthy that at oral argument the Court asked the government on what set of facts it would deem the

"strict control" test met in this case; the government was unable to provide a definitive or even helpful answer, suggesting merely that the test might be met if a badge-wearing FAA official read the applicable medical standards to each AME in person before each examination.

In this Court's view the "strict control" test should be applied not with the absurd literalness suggested by the government, but sensibly, with due regard for the totality of the circumstances, including the nature of the services performed and the configuration of the parties' relationship. It is therefore unnecessary to adopt, as plaintiffs suggest, a modified version of *Logue* and *Orleans* for physicians.[4] *Logue* and *Orleans* were clearly intended to have broad based application beyond the confined factual scenarios suggested by the language employed. The decisions prescribe a functional approach, focusing on the activity involved, the need and opportunity for supervision and the amount and source of the supervision or oversight. In *Logue* the Bureau of Prisons deferred entirely to the County jail officials who supervised the day to day operations of the facility without interference of any kind from the federal government. Similarly, in *Orleans*, the community action agency ran its daily operations unencumbered by the scrutiny or supervision of federal authorities. The negligent employees in those cases were supervised not by any federal entity or representative, but by their local employers. The particular language used to articulate the "strict control" test in *Logue* and *Orleans* constitutes a sensible and appropriate test for vicarious federal liability in cases where the relevant players' relationship is structured

---

4 In addition, the Court notes that contrary to plaintiffs' assertion, no other court has so held. Plaintiffs cite two cases which they believe "establish" the principle that a *modified* "strict control" test should apply to physicians. *See Lurch v. United States*, 719 F.2d 333 (10th Cir. 1983); *Quilico v. Kaplan*, 749 F.2d 480 (7th Cir. 1984). In each case, however, the passages upon which plaintiffs hang their hats are pure dicta.

Nonetheless, this Court's decision to apply the strict control test sensibly necessarily embraces part of the reasoning of the *Lurch* plaintiff, who argued that those areas of medical services that *are* susceptible to supervision and control should be considered in determining if a physician is a federal employee." *Lurch*, 719 F.2d at 337 (emphasis in original).

as it was in *Logue* and *Orleans*. It therefore makes perfect sense that the Supreme Court require, as a condition to holding the federal government liable for the *employees of* an entity with which it contracts, that the government have exercised over that entity's employees at least as much, if not more control than that entity actually exercises over those same employees.

This is not to suggest that the "other entity" in each of those cases existed, in the eyes of the Court, as a mere alternate deep-pocket for recovery. Rather, the other entity in each of those cases, as the actual employer of the allegedly negligent individuals, functioned as the primary or more proximate employer and supervisor of *its* own employees. Put yet another way, *Logue* and *Orleans* would better support the government's argument here if, for example, the FAA had contracted with the American Medical Association, or with a particular hospital, to designate AMEs to conduct pilot certification exams, and these AMEs were *members of* the Association or *employees of* the hospital and subject to some primary level of supervision or control by the Association or hospital. It is on that factual paradigm that the *Logue* and *Orleans* decisions rest.[5]

---

5 The government also places reliance on an opinion of the District Court of the Northern District of Texas, *In Re Air crash at Dallas/Fort Worth Airport on August 2, 1985*, Memorandum opinion filed Nov. 5, 1987, M.D.L. No. 657 (the "*Dallas* case"). The issue in that case was whether a negligent weather observer was an employee of the government or an employee of an independent contractor. The facts are structurally analogous to those in *Logue* and in *Orleans*: the National Weather Service ("NWS") contracted with a group called Weather Experts to carry out NWS's duty to operate a weather observatory at Dallas/Forth Worth Airport. Although the NWS provided Weather Experts with instructions for weather observing and reporting, the Court, applying the *Logue* test (whether there is authority in the principal to "control the physical conduct of the contractor in the performance of the contract") concluded that *employees of Weather Experts* were not employees of the government. Mem. Op. at 8.

The players' relationship in the *Dallas* case thus exhibits the same structure as the relationships in *Orleans* and *Logue*, so the decision in the *Dallas* case does not affect this Court's analysis of *Logue* and *Orleans*.

In sum, *Logue* and *Orleans* do not prescribe a ritualistic, inflexible formula. The cases instead articulate a sensible, flexible rationale for holding the sovereign vicariously liable which may be applied to a variety of situations. In essence, the cases shield the government from vicarious liability unless the government exercises *comprehensive* and *meaningful control* over the allegedly negligent actor as he performs the *material aspects* of his government-commissioned task. This Court cannot envision a more comprehensive or more meaningful scheme for monitoring the AMEs' contribution to the safety of air travel than that presently designed and implemented by the FAA.

D. *"Persons Acting on Behalf of a Federal Agency in an Official Capacity. . ."*

Although Congress defined "employee of the Government" to include "persons acting on behalf of a federal agency in an official capacity . . . ," the government argues that this Court should disregard this clause in assessing the status of AMEs. While the Court acknowledges that the clause is cited relatively infrequently in FTCA cases, the Court is not persuaded that the clause is necessarily inapplicable to the case at bar. In any event, in light of the previous discussion, extended analysis of the arguments presented on this point is unnecessary.

The government relies on a discussion in *Logue* of the FTCA's legislative history to support its position that Congress intended the "acting on behalf of" clause to apply to only a few special and limited situations. *See Logue*, 412 U.S. at 530-31. The *Logue* Court acknowledged that

> [t]he legislative history to which we are referred by the parties *sheds virtually no light* on the congressional purpose in enacting the "acting on behalf of" language in § 2671.

Id. at 531 (emphasis added). The Court observed that a single passage in an appendix to the hearings comparing the bill as enacted with previous drafts merely

> *affords some support* to the Government's contention that the language is designed to cover special situations such as the "dollar-a-year" man who is in the service of the Government without pay, or an employee of another employer who is placed under direct supervision of a federal agency pursuant to a contract or other arrangement."

Id. at 532 (emphasis added). Obviously, then, *Logue* does not demand the limited application suggested by the government. With or without *Logue*, however, it is equally clear that the result is the same.

Plaintiffs cite two cases, both holding the United States liable. In *Witt v. United States*, 462 F.2d 1261 (2d Cir. 1972), the plaintiff, a military prisoner assigned to the Parolee Unit at the United States Disciplinary Barracks, one day volunteered for a prison work detail at a nearby private club which frequently used prison labor. The club hired one individual, who in turn hired a second, to transport prisoners from the barracks to the club. The plaintiff was injured as a result of the second individual's negligence during the trip from the barracks to the club.

The Second Circuit held that the second hiree was an employee of the government for FTCA purposes because he was "acting on behalf of" the government. The Court believed it "unnecessary" to explore the relationship between the second hiree and the club or between the club and the Army. Instead, the Court reasoned that despite the absence of any written agreement, the second hiree was "impliedly authorized" by the Barracks Commander to transport and help supervise prisoners, and "was certainly *amenable to some degree of control* by the Disciplinary Barracks." 462 F.2d at 1264 (emphasis added).

As to the meaning of the "acting on behalf of" clause itself, the *Witt* Court observed that while the clause "is not without boundaries, . . . *quite clearly the statutory language was drafted to have an expansive reach* . . . and should be applied with an eye to general agency law rather than to the

formalities of employment contracts." 462 F.2d at 1263 (emphasis added) (citations omitted).

In *Close v. United States*, 397 F.2d 687 (D.C. Cir 1968), the Court held that the United States could be liable under the FTCA to a federal prisoner injured while temporarily housed in a District of Columbia jail. Expressly relying on the "acting on behalf of" clause, the Court noted that:

> since the Congress has clearly committed the custody and safekeeping of federal prisoners to the Attorney General, then it must be true that in this instance the D.C. jailer was serving as the Attorney General's jailer; and . . . that, as to the federal prisoner, the Attorney General had *some degree of power, commensurate with his continuing responsibility*, to *supervise* the D.C. jailer in his handling of this particular prisoner.

Id. at 687.

Applying these principles, without the guiding hand of *Logue*, this Court could easily conclude that the AMEs were employees of the government since (i) the AMEs are "amenable to some degree of control" by the FAA, *see Witt*, *supra* at 1264, and (ii) the FAA, commensurate with its statutory duty to promote air safety, had "some degree of power" to supervise the AMEs in their handling of the medical certification for pilots. *See Close*, *supra* at 687.

The Court is by no means, however, content with such reasoning. A plain, common sense reading of the clause, in light of the facts set forth at the outset of this opinion, supports the conclusion that the AMEs are employees of the government more soundly than reliance on the limited discussion of the clause in *Witt* and *Close*. The government concedes that the AMEs perform a very important task and unquestionably act "for" the FAA; the FAA's own literature describes the AMEs as the agency's "official representatives;" and this Court has already concluded that the FAA exercises about as much control and supervison over the AMEs as practicable. Thus, the Court can see no reason why the government should not be answerable for an AME's alleged negligence. Such a conclusion is prompted by the Supreme Court's invi-

tation to rest even "acting on behalf of" cases on a finding of *Logue*-type control. That invitation is a brief footnote in *Logue* in which the Supreme Court distinguished, but did not overrule, the holdings of *Witt* and *Close*, noting that those two cases "involved *findings of control* by the Government that are contrary to [the lack of control found by the lower court in the *Logue* case]." *Logue*, *supra*, 412 U.S. at 533, n.8 (emphasis added). Moreover, even if the *Logue* Court had not so addressed (albeit obliquely) the "acting on behalf of clause," it would be illogical to conclude that the clause offers a materially different rationale for federal liability or that it may be used formalistically to circumvent the basic "strict control" requirement.[6]

In short, this Court concludes that the sovereign cannot be held vicariously liable absent substantial and meaningful control by the sovereign, regardless of the statutory or other legal term the Court may be asked to construe. To reiterate, then, it is not seriously disputed that the AMEs act on behalf of the FAA when conducting pilot certification examinations, and this Court has already decided, *see section* C, *supra*, that the FAA exercises significant, comprehensive control over the AMEs. Accordingly, the AMEs are employees of the government under the FTCA for whose alleged negligence the United States is answerable.

---

6 The fact that the "contractor" language creates an exception to only the definition of federal agency, and not to the definiton of "employee of the government," of course invites the circumvention argument—namely, that because the strict control test was occasioned by the Supreme Court's interpretation of the contractor exception, reliance on the "acting on behalf of" clause should not even implicate *Logue* and *Orleans*. This Court rejects such a formalistic intepretation of the statute, however, and for essentially the same reasons it rejects a formalistic reading of the language in *Logue* and *Orleans*. Those cases clearly state a rationale for vicarious federal liability which was meant to be applied to a wide range of factual sitations, and which was clearly not meant to be inapplicable merely because a particular set of facts may also happen to come within the "acting on behalf of" clause. In sum, whether construing the term "employee of the government" by way of the "contractor" exception or the "acting on behalf of" clause, the determinative issue is control by the sovereign, and the theology of *Logue* and *Orleans* accordingly, must obtain.

CONCLUSION

For the reasons set forth above, the government's motion is denied and the plaintiffs' cross-motion is granted. The portion of the government's fifth affirmative defense, asserting the independent contractor exception, shall be stricken.

SO ORDERED.

Dated: Brooklyn, New York
June 27, 1989

/s/ RAYMOND J. DEARIE
RAYMOND J. DEARIE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 90-6017

Filed September 6, 1990

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6 day of September, one thousand nine hundred and ninety

REYNOLD LEONE, As Administrator of the Estate of ANDREA LEONE, Also known as ANDREA HELD, Decease, FRANCES S. COSTIGAN (now known as COSTIGAN-LEEDS), as Executrix of the Estate of GEORGE B. COSTIGAN JR., Deceased,

Plaintiff-Appellees.

v

UNITED STATES OF AMERICA,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for plaintiffs-appellees, Reynold Leone and Frances S. Costigan.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
ELAINE B. GOLDSMITH
CLERK